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No. 71-1224

In the
Supreme Court of the United States
OCTOBER TERM, 1971

ALFRED EDWARD McGEE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

REPLY TO MEMORANDUM FOR THE UNITED STATES

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1) The Government asserts that adding the petitioner to the June 11th induction call was not improper. This Court condemned accelerated inductions in *Gutknecht* v. *United States,* 396 U.S. 295. But for the local board's letter (Government Exhibit 52) the petitioner would not have been included in the June 11th induction call. Without the extraordinary request singling out the petitioner, the petitioner in all likelihood would have been included

in the call to be delivered in July or the call to be delivered in August. By its action, the board and the State Director accelerated the petitioner's induction by at least one month. The issue here is not was the petitioner taken out of turn but was he taken earlier than he should have been taken. The Government itself by its Exhibit 52 proved that the petitioner was called early.

2) The Government seeks to excuse the State Director's conduct in adding the petitioner to the local board's call by asserting "the matter of allocating to the local boards within the State the number of men to be called rest solely in the discretion of the State Director . . ." (Memorandum in Opposition page 5). The Solicitor misstates the law, the State Director is not free to ignore the statute: 50 App. U.S.C. Section 455(b). The statute requires:

> "Quotas of men to be inducted for training and service under this title shall be determined for each state . . . *and for subdivisions thereof*, on the basis of the actual number of men in the several States . . . and for the subdivisions thereof, who are liable for . . . service but were not deferred . . .except that credits shall be given in fixing such quotas for residents of such subdivisions who are in the Armed Forces on the date fixed for determining such quotas." 50 App. U.S.C. Section 455(b)

In other words, the State Director in allocating the quota among the local boards in his State is bound by the statutory formula which requires him to allocate the draft call among the local boards on the basis of the number of men registered with each local board liable for service but not deferred and the number of men from that board in the Armed Forces. Just as the statute requires the

National Director to allocate the draft call for the Nation among the States on the basis of the statutory formula so too, the statute compels the State Director to allocate the call for his State among the local boards on the basis of the statutory formula. The State Director may not in his sole discretion ignore the statutory formula and increase a single board's fair share of the draft call for the purpose of drafting a single named individual.

Nothing in the record suggests that the call was illegal before it was increased, but even if the local board had suggested a basis for recalculating the quota (i.e. that the call was too small because more of its registrants were available or out of the Armed Forces than it earlier reported) it would still be up to the State Director to compare the local board's figures with the reports from other local boards in the State and then decide whether he should reallocate the State's call among all of the boards in the State. The local board had no way to lawfully determine that its draft call should be bigger when the local board on its own initiative was asking the State Headquarters to draft more than the local board's share of the State's draft call, it was doing so without any authority in the regulations or the statute. The Board and the State Director did not in exhibit 52 even allude to the statutory requirements for allocating quotas among local boards. Their purpose was not the impartial administration of the law but something far more sinister.

It is plain from the record in this case that Illinois Local Board No. 79 wanted to get the petitioner. This Court and the due process clause of the Fifth Amendment to the Constitution of the United States of America should protect an individual when Government officials transform

a purportedly impartial system of selection into one that permits the officials to carry out personal or unexpressed vendettas.

3) The petitioner's procedural rights to seek new deferments were materially changed when the induction order was issued. The Government contends that the petitioner was not prejudiced because the record does not show that the petitioner would have been deferred if he had been allowed to exercise the procedural rights which terminated when the induction order was issued. The Government should not be permitted to deprive a person of a procedural right and then argue that the failure to exercise the right which the Government withheld justifies the withholding of the right.

4) The Government argues that the issues presented by the petition are less important because the order in which men are called by Selective Service is now governed by a lottery. The lottery governs the order in which men are called. Here we are not objecting the order in which the call was filled, but the fact that the call was not big enough to include the petitioner without disregarding the proper allocations of the National draft call to the local board. The statute governing the allocations of quotas is the same now as it was when the petitioner was ordered to report for induction. Section 5(b) of the Military Selective Service Act, 50 App. U.S.C. Section 455(b). No regulations have been promulgated by the President to change the statutory system of allocating quotas. The Solicitor General on page 3 of his Memorandum concedes:

> ". . . We agree with petitioner that the procedure followed here should not be encouraged . . ."

The petitioner knows of no better way for this Court to discourage the practice described in this record than to grant the petition for writ of certiorari and reverse the judgment of conviction.

Respectfully submitted,

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